(34)

No. 517

Office - Supreme Court, U. S.
FILED
DEC 17 1943
CHARLES ELMORE CROPLEY
CLERK

In The
Supreme Court of The United States

OCTOBER TERM, 1943

PEN-KEN GAS & OIL CORPORATION,
Petitioner,

vs.

WARFIELD NATURAL GAS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief in Opposition to the Granting of the Writ

HAROLD A. RITZ,
Charleston, W. Va.
SIMEON S. WILLIS,
Frankfort, Ky.
DYSARD & DYSARD,
Ashland, Ky.
WELLS & WELLS,
Paintsville, Ky.
Counsel for Respondent.

WOODYARD PRINTERS, CHARLESTON, W. VA.

INDEX

Page

Statement 1

Petitioner's grounds 4

Argument 5

I. The judgment of the Circuit Court of Appeals and of the District Court is based upon uncontroverted facts 5

II. The first ground of attack made by petitioner upon the judgment of forfeiture is that the procedural requirements of the statute of Kentucky were not complied with 5

III. The judgment of forfeiture of the Circuit Court of Pike County was a final judgment and deprived the claimants of the title to the Haskell Patent of all interest therein 8

IV. The validity of the forfeiture judgment of the Pike Circuit Court was not affected by the attempted repeal of the statute in 1938 10

V. Sections 56 and 57, Kentucky Code of Civil Procedure, provide alternate remedies for acquiring jurisdiction against non-residents 10

VI. The forfeiture judgment transferred all right, title and interest of the claimants of the Haskell Patent to the Commonwealth 11

VII. The judgments of the Court of Appeals of Kentucky and of the Supreme Court of the United States are adjudications of the finality of the judgment of the Pike Circuit Court which was under review 12

VIII. The payment of taxes during the five years involved in the forfeiture proceeding was the very question which the Pike Circuit Court tried, and it is not now subject to review by collateral attack on that judgment.....12
This suit is barred by the provisions of Section 251 of the Constitution of Kentucky.....14
The Circuit Court of Appeals should have dismissed the appeal for lack of jurisdiction.....22

TABLE OF CASES

Page

C.

Conboy v. First National Bank, 203 U. S. 141 22
Connor v. Peugh, 18 How. 394 22

D.

Deskins v. Big Sandy Co., 121 Ky. 601, 89 S. W. 695 9

F.

Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 65 L. ed. 892 15

H.

Helvering v. Gowran, 302 U. S. 238, 82 L. ed. 224-230 15

J.

Jones v. Thompson, (CCA8), 128 F. 2d 888 22

L.

Langnes v. Green, 282 U. S. 531-536, 75 L. ed. 520-524 15
Letulle v. Scofield, 308 U. S. 415, 84 L. ed. 355 15
Long v. Howard, 229 Ky. 369, 17 S. W. (2d) 207 9

M.

Mussman v. Pepples, 232 Ky. 254, 22 S. W. (2d) 605 6

P.

Pope v. Allis, 155 U. S. 363, 29 L. ed. 393-397 17

S.

Stelos Co. v. Hosiery Motor-Mend Corp. 295 U. S. 237, 79 L. ed. 1414 15

T.

Tichenor v. Wood, 70 S. W. 837 20

U.

United States v. Holt State Bank, 270 U. S. 49-56, 70 L. ed. 465-469 15
United States v. Am. Ry. Express Co., 265 U. S. 425-435, 68 L. ed. 1087-1093 16

W.

Warfield Nat. Gas Co. v. Ward, 286 Ky. 73-80.....16
Wayne United Gas Co. v. Owens Ill. Glass Co., 300 U. S. 131.....22
White v. Mechanics Security Corp., 269 U. S. 283-302, 70 L. ed. 275-280.....17
Willis v. Davis (6CCA), 184 Fed. 889.....22
Wing v. Hayden, 10 Bush. 276..... 9

CONSTITUTION AND STAUTES CITED

Appendix No. 1 (Sec. 4076d Ky. Statutes, 1936)..... *i*
Appendix No. 2 (Sec. 251 Ky. Constitution)..... *iii*
Kentucky Code of Civil Procedure, Sec. 56-57.....10-11
Kentucky Constitution, Sec. 251.....2-4-14-15-16
Kentucky Statutes, Carroll's (1936), Sec. 4076d.....8-11

No. 517

In The
Supreme Court of The United States

OCTOBER TERM, 1943

PEN-KEN GAS & OIL CORPORATION,
Petitioner,

vs.

WARFIELD NATURAL GAS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief in Opposition to the Granting of the Writ

STATEMENT

This is an ordinary suit brought for the purpose of recovering certain lands and for damages by reason of alleged trespasses thereon. Before the simplified procedure, it would have been an ordinary action of ejectment.

The defendant answered the petition and set up a number of defenses thereto. The defendant's answer is found at page 4 *et seq.* of the record. In addition to denying that petitioner had any title to the property for which it sues, certain affirmative defenses were set up in the answer, among others, that the title claimed by petitioner was adjudged to be forfeited by judgment of the Circuit Court of Pike County, Kentucky, rendered on the 20th day of February, 1908, and which judgment was duly affirmed upon appeal to the Court of Appeals of Kentucky and to the Supreme Court of the United States.

Another of the defenses is that petitioner's suit was barred by several statutory limitations requiring that such suits be brought within five years under certain conditions, within fifteen years and within thirty years.

On the 16th day of December, 1940, respondent filed its motion for summary judgment, contending that petitioner's suit was barred by the judgment of the Pike Circuit Court above referred to, and that it was also barred by the statute of limitations provided by Section 251 of the Constitution of Kentucky. This motion for summary judgment is found at page 25 *et seq.* of the record. Along with it was exhibited the record of the judgment of the Pike Circuit Court, the judgment of the Court of Appeals of Kentucky thereon, and the judgment of the Supreme Court of the United States thereon. There was also exhibited a certain petition filed by petitioner before the Securities and Exchange Commission in a proceeding pending before that Commission, which petition was sworn to by George E. Merrill, Secretary and Director of petitioner, on the 2nd day of February, 1940. This petition will be found at page 13 *et seq.* of the record.

To amplify and clarify the statements contained in the petition, affidavits were taken from the owners and claimants of the lands upon which this respondent held oil and gas leases, and also from other parties familiar therewith, identifying particularly the interest claimed by respondent and those under whom it claims. These affidavits are numerous and will be found at page 134 *et seq.* of the record.

This motion for summary judgment was served upon petitioner and duly filed on the 16th day of December, 1940, as appears from the order of the court entered on that day (R. 220), and in that order the case was assigned for hearing on the 13th day of January, 1941. The case

was afterward reassigned for argument on February 17, 1941, as appears from the order at page 221 of the record. On that date the petitioner announced itself ready for hearing on the motion for summary judgment and the matter was argued, as appears from the order at page 222 of the record.

The District Court entered judgment upon the motion for summary judgment and sustaining the same on February 3, 1942 (R. 285), and also made certain findings of fact and conclusions of law (R. 280-285).

Petitions for rehearing were filed by petitioner, in various forms, which were disposed of by an order entered by the District Court on April 29, 1942 (R. 325), and on July 20, 1942, petitioner gave its notice of appeal to the Circuit Court of Appeals from the judgment of the District Court entered on the 29th day of April, 1942, which was the order denying the rehearing and not the judgment sustaining the motion for summary judgment (R. 327).

It will be noted from the findings of fact and conclusions of law of the District Court (R. 280 *et seq.*), that that court held that petitioner's action was barred by the judgment of the Pike Circuit Court above referred to, as well as by the various statutes of limitations referred to. See conclusions of law, page 285 of the record.

Upon the appeal to the Circuit Court of Appeals for the Sixth Circuit, that Court, on June 1, 1943, handed down an opinion affirming the judgment of the District Court. This opinion is reported in 137 F. 2d 871 *et seq.* Subsequently, petitioner filed a petition for rehearing, and this petition was denied on the 31st day of August, 1943, and the petition for certiorari, now under consideration, followed, filed in this Court on the 30th day of November, 1943.

PETITIONER'S GROUNDS

The petitioner, at page 3 of the petition, states under a heading "Questions Presented" and at page 5, "Reasons for Granting the Writ."

These questions presented and supposed reasons for granting the writ are derived from the argument made by petitioner in the brief, beginning at page 14, and for the purpose of this brief, we will confine it to the discussion of the points made in that argument, with the belief that if these points appear to be without merit, there will be no basis for the petitioner's application.

In the opinion of the Circuit Court of Appeals, written by Judge Hamilton, that court confined its consideration to the one question of the bar of petitioner's action by the judgment of forfeiture of the Pike Circuit Court, and did not consider the bar of the statute of limitations under Section 251 of the Kentucky Constitution. The opinion of Judge Hamilton is so full, lucid and well-reasoned and supported by authority, that it would seem to afford a complete answer to the contentions petitioner makes in its argument, and it will only be necessary for us to briefly present our views in answer to each of the points raised by petitioner in the argument filed herein, beginning at page 14 of the brief.

ARGUMENT

I.

The Judgment of the Circuit Court of Appeals for the Sixth Circuit and of the District Court for the Eastern District of Kentucky, is Based Upon Uncontroverted Facts.

Petitioner argues at some length that a motion for summary judgment will not be granted where it is based upon controverted facts. It will be noted from the opinion of Judge Hamilton that this contention of petitioner is conceded. There are no controverted facts, however, in regard to the effect of the forfeiture judgment of the Pike Circuit Court. The judgment rendered in this case therefore depends entirely upon an interpretation of that judgment and not upon any finding of fact in regard thereto upon disputed evidence. The Circuit Court of Appeals found that there was not any genuine issue as to any material fact, and in so far as the bar of this judgment of the Pike Circuit Court is concerned, there could not well be any disputed fact. The judgment was set up as a bar to the suit, and petitioner sought to avoid the effect of the judgment by collaterally attacking the same, claiming that it was absolutely void, and the only question was whether or not this attack was meritorious.

II.

The First Ground of Attack Made by Petitioner Upon the Judgment of Forfeiture is That the Procedural Requirements of the Statute of Kentucky Were Not Complied With, in That the Petition Upon Which the Forfeiture Judgment Was Based Was Not Posted as Required by Law, or, Rather, That There Was no Clerk's Certificate Endorsed Thereon Showing That it Was Posted.

It may be well here to point to the holdings of the Court of Appeals of Kentucky in regard to collateral attacks upon judgments of courts of general jurisdiction. The law, as declared in Kentucky, is well expressed in *Mussman* v. *Pepples*, 232 Ky. 254, 22 S. W. (2d) 605, as follows:

> "There are certain well-defined principles of law applicable to the facts of this case. A judgment of a court of general jurisdiction cannot be collaterally attacked either in the court rendering the judgment, or in any other court unless the judgment be void. Oliver v. Belcher, 205 Ky. 417, 265 S. W. 942; Willis v. Tomes, 141 Ky. 431, 132 S. W. 1043. A direct attack on a judgment can only be made in the manner pointed out in Civ. Code Prac. Secs. 344, 414, and 518, or by appeal, *and any other attack is a collateral attack.* Logsdon v. Logsdon, 204 Ky. 104, 263 S. W. 728; Gardner v. Howard, 197 Ky. 615, 247 S. W. 933; Johnson v. Carroll, 190 Ky. 689, 228 S. W. 412. To warrant a collateral attack on a judgment of a court of general jurisdiction, want of jurisdiction *must appear on the record, and a pleading that merely alleges the absence of jurisdictional facts is not sufficient.* It must go *further and allege that the record actually shows the absence of the jurisdictional facts.* Johnson v. Carroll, supra; Ratliff v. Childers, 178 Ky. 102, 198 S. W. 718. It is also the rule that such a judgment cannot be attacked outside the record, although the record does not on its face show the jurisdictional facts. Anderson's Committee v. Anderson's Administrator, 161 Ky. 18, 170 S. W. 213, L. R. A., 1915C, 581."

The petitioner's contention is that the judgment of forfeiture is void because it does not appear from the record that the petition was posted at the front door of the court house as required by statute. Judge Hamilton, in the opinion handed down by the Circuit Court of Appeals, pretty fully discussed this question. In addition to the

matter alleged by Judge Hamilton, we call attention to the following:

Petitioner's contention is that it does not appear that the clerk endorsed upon the petition the fact that he posted it as required by law, and at the top of page 18 of its brief, the startling statement is made that it is the endorsement of this fact on the petition that gives the court jurisdiction and not the posting. In other words, petitioner's novel contention is that the thing which gives jurisdiction to the court in a lawsuit is the fact that somebody says that service of process has been had, regardless of whether or not it is true. The conclusion of the Circuit Court of Appeals is that the thing which gives jurisdiction is the service of process.

The petition in the forfeiture suit appears at page 36 *et seq.* of the record. Bearing in mind the doctrine that all reasonable inferences are in favor of the validity of a judgment of a court of general jurisdiction, we find by examination of the record that the clerk, immediately upon the fiilng of the petition, entered a warning order (R. 55), and on page 56 we find his endorsement certifying that the petition was filed June 3, 1907, signed by the clerk by his deputy, and immediately following this the statement that the petition in equity was filed on the ..... day of ....., 1907 (reading of the above endorsement would make it read June 3, 1907), and immediately posted a copy of the petition and exhibits thereto attached at the front door of the court house in Pikeville, Kentucky. The clerk did not state the time at which he posted it. This endorsement, it is true, is not signed by the clerk. The statute does not provide that it shall be signed by the clerk. It only provides that the clerk shall endorse on the petition that it was filed and that he immediately posted it, and this the record shows was done by the clerk's certificate.

In addition to this, the warning order attorney, who was a sworn officer of the court, sent a statement to each of the defendants, advising of the filing of the petition and of the effect thereof, and in this statement (R. 74) he makes the statement that "in accordance with the provisions of said Article, there is posted at the front door of the court house in Pikeville, Kentucky, a copy of said petition and all exhibits." This statement of his is under date of June 5th, only two days after the petition was filed. So that we have the endorsement of the clerk on the petition that he posted it immediately after its filing on June 3rd, and we have the certificate of the warning attorney, acting under his oath of office, on June 5th, that the same was posted in accordance with the provisions of law.

We therefore conclude that the record affirmatively shows not only that the petition was posted, but that an endorsement to that effect was made thereon.

III.

The Judgment of Forfeiture of the Circuit Court of Pike County, Entered February 14, 1908 (R. 127), Was a Final Judgment and Deprived the Claimants of the Title to the Haskell Patent of all Interest Therein.

The effect of the judgment of forfeiture in this case and the finality thereof is clearly prescribed by the law, and this is contained in Section 4076d, Carroll's Kentucky Statutes, Edition of 1936, which section is printed as Appendix No. 1 to this brief. This section provides the machinery for such proceedings, and then it declares that the court shall render judgment in accordance with the pleadings, exhibits and evidence adduced upon the trial which is had upon the petition, and then it declares the effect of such a judgment to be that the title or claim sought to be forfeited is forfeited and vested in the Commonwealth, and that such judgment shall operate as

a transfer to and vesting in the Commonwealth of the said title and claim of each and all of the defendants and those under whom they claim, without execution of deed or other instrument. There could not be a clearer declaration of the effect of the judgment and the finality thereof. All that follows is simply the execution of the judgment.

The fact, too, that the Court of Appeals of Kentucky, in which only final judgments will be reviewed, and the Supreme Court of the United States, in which only final judgments will be reviewed, did review the judgment entered in this case, indicates the views of those courts as to its finality. It would seem, however, that the statute itself it conclusive thereof.

Petitioner also complains that a copy of the judgment of forfeiture was never recorded in the County Clerk's office. Assuming that this is true, this in no wise affected the validity of the judgment, as stated by Judge Hamilton in the Court's opinion, at pages 352-353 of the record. It would constitute only a ministerial act designed for the protection of innocent purchasers. There is no showing here that petitioner was an innocent purchaser. Under the law of Kentucky, as construed by its court of last resort, one to be a bona fide purchaser must aver and prove payment of a valuable consideration and positively negative notice or knowledge.

Wing v. *Hayden,* 10 Bush 276;

Deskins v. *Big Sandy Co.,* 121 Ky. 601, 89 S. W. 695;

Long v. *Howard,* 229 Ky. 369, 17 S. W. (2d) 207.

Whatever may be the fact in regard to the recordation of the judgment in the County Clerk's office, petitioner is in no position to complain thereof until it first shows that it was a bona fide purchaser for value, and affirmatively and positively shows that it had no notice of the judgment at the time of the purchase. In this respect it has entirely failed.

IV.

The Validity of the Forfeiture Judgment of the Pike Circuit Court Was Not Affected by the Attempted Repeal of the Statute in 1938.

As before noted, under the statute of Kentucky upon which this forfeiture judgment was based, the judgment was final and complete and all title vested in the Commonwealth upon entry of that judgment. It necessarily follows from this that a subsequent repeal of the statute did not affect the validity of a final judgment, and the petitioner's argument upon this question is based entirely upon the assumption that the judgment of forfeiture was not a final judgment.

V.

Sections 56 and 57, Kentucky Code of Civil Procedure, Provide Alternate Remedies for Acquiring Jurisdiction Against Non-Residents.

This question is so completely disposed of by Judge Hamilton, in the opinion of the Circuit Court of Appeals, that little need be said in regard thereto. The learned District Judge, as well as the long-experienced Judge of the Circuit Court of Appeals who wrote the opinion in this case, were entirely familiar with the construction placed upon these statutes, and while there has never been any determination by the court of last resort of the Commonwealth of Kentucky in regard thereto, still, as Judge Hamilton states in his opinion, it has been the uniform practice of the bar of Kentucky to treat these sections as providing alternate remedies, and that jurisdiction might be acquired by proceeding under either of them.

The petitioner's statement on page 24 of the argument would convey the impression that one of these sections provides for acquiring jurisdiction of non-residents whose

place of residence is known, and the other of non-residents whose place of residence is not known.

Section 56 provides for sending out of the State and serving process in a case where the residence of the non-resident is known, and it is effective to confer jurisdiction.

Section 57 provides for constructive service of warning order, not only on unknown non-residents, but upon non-resident corporations, of non-resident persons, a person who has left the State to defraud, one who is absent from the State four months, one leaving the county to avoid service, and one concealing himself to avoid service. In all of these cases, proceedings may be had under Section 57, and clearly the court's construction of this is right, particularly taken in view of the fact that it has been the uniform interpretation placed upon these sections by the bar of Kentucky ever since their enactment, as stated by Judge Hamilton in the opinion of the Circuit Court of Appeals.

VI.

The Forfeiture Judgment Transferred All Right, Title and Interest of the Claimants of the Haskell Patent to the Commonwealth.

Section 4076d, Carroll's Kentucky Statutes, Edition of 1936 (which section is quoted in Appendix No. 1 hereto), prescribes the effect of such a judgment. The statute requires that the petition shall exhibit a copy of the patent under which the defendants therein claim, and then provides that if the judgment is one of forfeiture, it shall transfer and vest in the Commonwealth the title and claim of each and all of the defendants to the patent, wherever the same may be located. In order to give the court jurisdiction, it was necessary to show that the land lay at least partly in the county wherein the suit was brought, and this was the only purpose of describing the land as

partly in Pike County. The effect of the judgment, however, after it was rendered, was as broad as the State and forfeited every right which the defendants had in any county in the State, the jurisdiction of the court having once attached upon a showing that a certain part of the lands lay in Pike County. The opinion of the Circuit Court of Appeals very satisfactorily disposes of this question.

VII.

The Judgments of the Court of Appeals of Kentucky and of the Supreme Court of the United States are Adjudications of the Finality of the Judgment of the Pike Circuit Court Which Was Under Review.

Petitioner makes the claim that the judgments of the Court of Appeals of Kentucky and of this Court, affirming the forfeiture judgment, are of no effect in this case. We cannot assent to this proposition in its entirety. The jurisdiction of the Court of Appeals of Kentucky is limited to reviewing final judgments. Likewise, the jurisdiction of this Court is limited to the reviewing of final judgments. And the very fact that the Court of Appeals of Kentucky and this Court took jurisdiction and did review the judgment, is an adjudication that the same was a final judgment.

VIII.

The Payment of Taxes During the Five Years Involved in the Forfeiture Proceeding Was the Very Question Which the Pike Circuit Court Tried, and it is Not Now Subject to Review by a Collateral Attack on That Judgment.

A reference to the record will show that a trial was had before a jury. The evidence taken upon this trial was directed largely to this very question as to whether or not any taxes had been paid upon this patent (R. 88 *et seq.*).

The verdict of the jury was that no such taxes had been paid. This verdict was carried into judgment, and this adjudication by a court having jurisdiction of the subject-matter is final and conclusive, particularly against a collateral attack such as is made here.

In this brief we have not undertaken to discuss elaborately the various points made, but we invite the Court's attention to the very complete, lucid and well-reasoned opinion of the Circuit Court of Appeals, which is found at pages 335-401 of the record and reported in 137 F. 2d 871.

Petitioner in its petition, on page 8, paragraph V of its "reasons for granting the writ", and on page 11 of its brief under "statement of facts", complains that Robert Boyd was not made a party defendant to the proceeding, and asserts that the petition filed in the forfeiture proceeding in Pike County affirmatively shows that Robert Boyd was an owner of at least part of the title at the time of the filing of the petition. This statement is a misrepresentation of the facts stated in the petition. The pertinent parts of the petition will be found at page 40 of the record, and there states that on the 20th day of March, 1902, by deed recorded in Deed Book No. 24, at page 54, Pike County Court Clerk's Office, Boyd conveyed all of his interest to Robert Fletcher Rogers, and that there is no record that Rogers had ever conveyed the same or any part thereof.

In the next paragraph of the petition it is stated that on October 2, 1905, one George H. Taylor, without exhibiting any authority except the statement that he is the son of Maria Taylor of Norfolk, with the further statement that this deed was made after a deed from Maria A. Taylor to one William H. Jonas, who was the source of Boyd's claim which he had conveyed, as stated in a former paragraph, in 1902 to Rogers. So that the record shows clearly that at the time the petition was filed, Boyd had no title whatever to any interest in the land.

Judge Hamilton, in his opinion on rehearing, at page 402 of the record, disposes of this question very satisfactorily, except that it is there stated that the deed from Robert A. Boyd to Robert Fletcher Rogers was dated March 20, 1908, instead of March 20, 1902, as appears from the petition.

The petition calls attention to the amount involved as being proper to invoke the jurisdiction of this Court. All of the injury claimed is by the extraction of natural gas from the premises by this respondent. In the petition in this case, petitioner fixes its damages at $70,466,900.00, a purely fantastic amount. In the petition which it filed before the Securities and Exchange Commission, it deemed it necessary to more fully state the extent to which this respondent had developed the land by the production of natural gas. At page 19 of the record, the statement is made that approximately 50,000,000 cubic feet of gas has been extracted by this respondent, which was worth at wholesale 26 cents per thousand cubic feet, or a total of $13,000.00, or 50 cents at retail, or a total of $25,000.00. This statement was sworn to by the Secretary and a Director of the petitioner, and is very much nearer the fact than the fantastic amount claimed in the complaint.

It appears from the statements filed following page 12 of the record, that this respondent claims oil and gas leases on 26,855.13 acres upon which it has drilled. It certainly is a fantastic claim that this extent of acreage, even at its full value, was worth any such amount as is claimed by petitioner.

THIS SUIT IS BARRED BY THE PROVISIONS OF SEC. 251 OF THE CONSTITUTION OF KENTUCKY.

The District Court sustained the motion for summary judgment upon two grounds: (1) that the suit was barred

by the judgment of forfeiture entered in the Circuit Court of Pike County in the case of *Commonwealth of Kentucky* v. *Eastern Kentucky Coal Lands Corporation, et al.*, on the 14th day of February, 1908; and (2) that the same was barred by the statute of limitations under Section 251 of the Kentucky Constitution (court's opinion, R. p. 275, and findings of fact and conclusions of law, R. p. 280-285).

The Circuit Court of Appeals dealt only with one of the grounds upon which the lower court's judgment was based, and having concluded that this ground barred the plaintiff's right to recover, affirmed the judgment of the District Court without adverting to the application of the statute of limitations provided by the Kentucky Constitution, Section 251. This failure of the Circuit Court of Appeals to notice the application of the statute of limitations, above referred to, does not prevent this court from considering that ground as one justifying the judgment of the District Court.

In the case of *Helvering* v. *Gowran*, 302 U. S. 238, 82 L. ed. 224, Mr. Justice Brandeis, at page 245 of the official report, page 230 of the L. ed., stated the law to be that:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

This doctrine is fully supported by the following authorities:

United States v. *Holt State Bank*, 270 U. S. 49-56, 70 L. ed. 465-469;

Frey & Son v. *Cudahy Packing Co.*, 256 U. S. 208, 65 L. ed. 892;

Stelos Co. v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 79 L. ed. 1414;

Langnes v. *Green*, 282 U. S. 531-536, 75 L. ed. 520-524;

Letulle v. *Scofield*, 308 U. S. 415, 84 L. ed. 355;

United States v. *American Ry. Express Co.*, 265 U. S. 425-435, 68 L. ed. 1087-1093.

Authorities on this point might be indefinitely multiplied, but those above cited are sufficiently illustrative.

Section 251 of the Kentucky Constitution is:

> "No action shall be maintained for the possession of any lands lying within this state, where it is necessary for the claimant to rely for his recovery on any grant or patent issued by the Commonwealth of Virginia, or by the Commonwealth of Kentucky prior to the year one thousand eight hundred and twenty, against any person claiming such lands by possession to a well defined boundary, under a title of record, unless such action shall be instituted within five years after this Constitution shall go into effect, or within five years after the occupant may take possession; but nothing herein shall be construed to affect any right, title or interest in lands acquired by virtue of adverse possession under the laws of this Commonwealth."

In this case the plaintiff relies upon a patent issued to Benjamin Haskell by the Commonwealth of Virginia on the 15th day of February, 1797 (R. p. 57). It will appear from this patent that the case is brought clearly within the provisions of Section 251 of the Constitution of Kentucky above quoted, which bars any suit to recover thereon in five years after the occupant may take possession. The construction of this provision and its application fully appears from the case of *Warfield Natural Gas Co.* v. *Ward*, 286 Ky., 73-80, etc.

The defendant advanced as one of its grounds for summary judgment the bar of this statute of limitations and, in support thereof, relied upon the admissions of the plaintiff in its complaint filed herein (R. p. 1), and the admissions of the plaintiff contained in a pleading filed by it before the Securities and Exchange Commission in a proceeding pending before that Commission in which War-

field Natural Gas Company was one of the parties, in which proceeding the plaintiff in this suit sought to intervene (R. pp. 13, 19 and 20), and upon a number of affidavits filed and served upon the plaintiff on December 16, 1940 (R. pp. 220, 221). The court set the case down for hearing on February 17, 1941, and on that date the parties announced themselves ready (R. p. 222), and the plaintiff filed certain counter-motions and affidavits. The hearing was not completed at that time, and on April 10, 1941, the plaintiff filed certain other motions and affidavits (R. p. 261), and on May 23, 1941, the plaintiff filed another affidavit, and on May 26th certain other matter. On December 3, 1941, the court passed upon the motion (R. p. 275), and on February 3, 1942, entered its final judgment sustaining the motion and dismissing the cause.

It will thus be seen that practically a year elapsed from the time the defendant's motion for summary judgment, accompanied by affidavits and other papers, was served on the plaintiff until the court finally decided the case.

In presenting this question, we call the court's attention first to the admissions of the plaintiff contained in the complaint filed in this case (R. p. 1), and in the pleading filed before the Securities and Exchange Commission (R. pp. 13, 19 and 20). These admissions are evidence of the very highest character. The petition filed before the S. E. C. was verified by the oath of an officer of the plaintiff and, of course, carries such additional weight as the oath of this officer may import. That such admissions are evidence of a very high character, cannot be doubted.

In *Pope* v. *Allis,* 155 U. S. 363, 29 L. ed. 393, at page 371 of the official report and page 397 of the L. ed., the court said:

> "When a bill or answer in equity or a pleading in an action at law is sworn to by the party, it is competent evidence against him in another suit as a

solemn admission by him of the truth of the facts stated."

White v. *Mechanics Security Corp.*, 269 U. S. 283-302, 70 L. ed. 275-280.

The plaintiff in its complaint in this case (R. p. 2) avers that the defendant entered upon its real estate in 1930 and committed trespasses thereon by the construction of gas wells and producing gas therefrom, and has continued in that possession and in that commission of acts of trespass, up to the date of the commencement of the suit, which acts of trespass it avers was to its damage in the sum of $70,466,900.00. This averment brings the plaintiff's suit clearly within the bar of Section 251 of the Constitution of Kentucky above quoted.

In the pleading filed by the plaintiff before the Securities and Exchange Commission, which was sworn to by the Secretary and a Director of the plaintiff on the 2nd day of February, 1940, the plaintiff alleges that it employed an engineer in 1932 to make an examination of the property claimed by it for the purpose of determining the trespassers thereon, and that it found 286 gas wells upon the property claimed by various companies named in said pleading (R. p. 19); that of these wells some 200 were owned and operated by this defendant, either under lease agreements from the purported owners of said properties on which the said wells were located, or by reason of purported land deeds held by said Warfield Company; and that this defendant has engaged in the continuous ownership and operation of said wells and has drilled more wells upon said lands since the year 1931, and has taken, between the years 1933 and 1940, a total of approximately 50 million or more cubic feet of gas, which was worth 26 cents per thousand cubic feet wholesale and approximately 50 cents per thousand cubic feet at retail.

On page 20, it avers that on July 23, 1931, it notified the defendant that it (the defendant) was trespassing upon

plaintiff's properties by maintaining and operating said gas wells and pipe lines, and that on September 8, 1931, the defendant repudiated the plaintiff's title and denied that it had any right to the lands and refused to recognize its claim.

In this pleading the plaintiff is very specific as to the acts that this defendant has been guilty of and as to the result thereof. It will be noted that it is averred that it has extracted from the said lands 50 million or more cubic feet of gas, which was worth at wholesale 26 cents, or a total of $13,000.00, and at retail 50 cents, or a total of $25,000.00. This statement of the plaintiff is more nearly the fact than its claim of $70,000,000.00 in its complaint, and makes it manifest that the extravagant sum claimed in the complaint is no more than a front to convey the impression that the plaintiff's claim is of immense value.

It will be noticed in these pleadings that the plaintiff avers that much more than five years before the institution of the suit on May 9, 1940, the defendant was in possession of the lands or interest in lands which it now claims, and not only this, but that the plaintiff was fully advised thereof and fully advised that the defendant denied its title or claim of title thereto; and, notwithstanding these facts, it waited until 1940 to bring suit, at which time the bar of the Kentucky constitutional provision had run against it. It is significant, too, that while the motion for summary judgment was served on the plaintiff on December 16, 1940, with which was included this pleading, and was not decided by the court until December, 1941, almost a year, the plaintiff never, during that time, offered any explanation or excuse for the admissions and averments in its pleadings above referred to.

In support of these judicial admissions made by the plaintiff, this defendant filed with its motion for summary judgment certain affidavits and supporting papers. It

filed a list showing the property in which it claimed an interest by leases from the owners thereof, giving the name, the lease number, the date of each lease, the deed book, page and date of record, postoffice addresses of the lessors, and where the ownership of the land had been changed, the name of the new owner, the date of such change and the address of such new owner, the number of acres contained in each lease, the number of wells drilled and the date on which each well was drilled and completed, and the source of title of the defendant's lessor, including the date of his deed and the place of record. (Record following p. 12). This information covers 22 pages and is in a form as convenient and brief as it could be set forth. It affords by reference an available description of each tract leased. To incorporate a complete copy of each lease would have been an unnecessary burden, both on the court and the defendant. It is a rule of law that a description is certain which may be made so. *Tichenor* v. *Wood*, 70 S. W. 837. Each of these tracts of land is claimed and held to the extent of the boundaries defined in the title papers, incorporated by reference to Exhibit "A", which gives a definite, certain and complete identification of every boundary on which it has a well or wells or has extracted gas or oil, or is holding under lease.

In addition to this, the defendant filed the affidavits, in most cases, of the owners of the several tracts of land, and in other cases, of parties familiar with the facts, showing the possession of each of these parties of the tracts of land claimed by them, for a great many years. These affidavits are found at pages 140 and following of the record. They are specific in their statements and show that each of the claimants under the deeds referred to were then in possession of their land and had been for many, many years prior to the time the plaintiff ever became interested therein.

All of these affidavits were served on the plaintiff on December 16, 1940. It makes no effort to deny a single specific statement made by any of the affiants. It does not say that in the case of a single one of the affiants the statements made by them are not exactly correct, nor is there a statement in any of the plaintiff's defenses that indicates that it is in possession or ever had any possession of any of the tracts of land in which the defendant claims an interest. All that the plaintiff does is to say that there has been no possession adverse to it except by squatters, and that it or some of its agents were upon the land some thirty years before the suit was brought. The denials of possession by the plaintiff was put in such form by the qualification of possession only by squatters, as to avoid a charge of perjury.

The plaintiff admits that the map at page 137 of the record correctly represents the territory claimed by it. It will be noted that on this map the City of Pikeville is included within this area. The courts judicially know that Pikeville is the county seat of Pike County, Kentucky, and is one of the places at which the United States District Court for the Eastern District of Kentucky sits regularly, and the District Court was entirely justified in its finding at page 284 of the record, that:

> "The defendant filed a large number of affidavits in due and proper form, and the Court finds that the defendant, and its lessors are now, and for more than fifteen and for more than thirty years next preceding the commencement of this suit, have been continuously in the actual, open, notorious, exclusive, peaceable, uninterrupted, hostile and adverse possession of the lands identified and listed in Exhibit 'A' filed with its answer, and being all the lands involved in this case. Copies of the said affidavits were duly served upon plaintiff prior to the 16th day of December, 1940, *and no affidavit or other evidence to contradict any of the facts stated*

therein have been offered, and no showing that such evidence was available or in existence, and this cause was submitted on the Motion for Summary Judgment by agreement on the 2nd day of September, 1941."

It is hard to conceive, from a consideration of the record, how the District Court could have reached any other conclusion than that the facts making applicable the statute of limitations of five years were not in dispute.

The Circuit Court of Appeals Should Have Dismissed the Appeal for Lack of Jurisdiction.

On page 334 of the record there is a motion on the part of Warfield Natural Gas Company to dismiss the appeal, upon the ground that the same was taken from the order of April 29, 1942, being the order denying the rehearing, and that no appeal was ever taken from the final judgment rendered on February 3, 1942.

The order of April 29, 1942, from which the appeal was taken, appears at page 325 of the record, and the final judgment appears on page 285 of the record.

The court, by an order entered on February 9, 1943, passed this motion until final hearing, but on the final hearing did not notice the same. The order of April 29, 1942, appealed from, was not an appealable order.

Willis v. *Davis,* (6CCA) 184 Fed. 889;
Connor v. *Peugh,* 18 How. 394;
Conboy v. *First National Bank,* 203 U. S. 141;
Wayne United Gas Co. v. *Owens Illinois Glass Co.,* 300 U. S. 131.
Jones v. *Thompson,* (CCA8) 128 F. 2d 888.

These authorities, as well as many others, clearly make manifest the conclusion that the order appealed from was not an appealable order, and no appeal having been taken within the time provided by law, or at any other time, from

the final judgment entered February 3, 1942, the Circuit Court of Appeals should have sustained the motion to dismiss instead of proceeding to a decision of the cause on its merits.

It is respectfully submitted that there is no ground for granting the writ.

HAROLD A. RITZ,
Charleston, W. Va.
SIMEON S. WILLIS,
Frankfort, Ky.
DYSARD & DYSARD,
Ashland, Ky.
WELLS & WELLS,
Paintsville, Ky.
Counsel for Respondent.